United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-4195

To Be Argued By
Frank L.Silverman

In The
UNITED STATES COURT OF APPEALS
For the Second Circuit

Docket No. 76-4195

FRANK L.SILVERMAN,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

FRANK L.SILVERMAN and ANNA SILVERMAN,

Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

BRIEF FOR PETITIONERS-APPELLANTS

FRANK L.SILVERMAN,PRO.SE
FRANK L.SILVERMAN,Attorney
ANNA SILVERMAN
Office & P.O.Address
258 Broadway
New York,N.Y.10007
(212) 267-2760

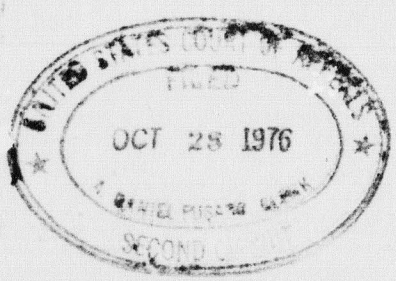

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TABLE OF CONTENTS

CITATIONS

Statute Involved

Title 28 United States Code,Rule 59.

Rule 59 of the Rules of Civil Procedure:

(a) A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury,for any reason for which new trials have heretofore been granted in actions at law in the Courts of the United States; and(2) in an action tried without a jury,for any reason for which rehearings have heretofore been granted in suits in equity in the Courts of the United States. On a motion for a new trial in an action tried without a jury, the Court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make & new findings and conclusions,and direct the entry of a new judgment.

(b) Time of Motion, A motion for a new trial shall shall be served be served not later than 10 days after the entry of the judgment.

In The

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No.76-4195

FRANK L.SILVERMAN, Petitioner-Appellant, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	APPEAL FROM THE UNITED STATES TAX COURT
FRANK L.SILVERMAN and ANNA SILVERMAN, Petitioners-Appellants, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	

BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether the denial by the Court below the petitioners-appellants' motion for a bill of particulars, to clarify the 90 days statutory notices,dated June 8,1968 and September 15,1972, was clearly erroneous?

2. Whether the denial by the Court below to grant petitioners-appellants' motion for discovery with respect the 90 day statutory notices pursuant to Rule 71, is clearly erroneous?

3. Whether the denial of the petitioners motion for discovery pursuant to United States Tax Court Rule 71, and the statements made by the presiding Judge in the Court below on September 22,1975 and prior statements made by the presiding Judge, September 22,1975, constituted error by the Court below and when said Judge presided at the above cause?

4. Whether the denial of the petitioners' request for a reasonable adjournment in the Court below,February 24,1976, upon the receipt of approximately 1000 exhibits,is clearly erroneous?

5. Whether the Court's insistence that petitioners sign a stipulation of consent is not clearly erroneous?

6. Whether the Court's refusal to grant petitioners a mistrial in the Court below, in the light of what took place in the Courtroom June 24,1976, is clearly erroneous?

7. Whether the Court below having failed to eliminate the penalty provision of income that respondent shifted from the taxable year 1966 to taxable year 1965,is clearly erroneous?

8. THE COURT below erroneously denied petitioners request to vacate the stipulations of July 12,1976, due to petitioner Frank L. Silverman illness and in a state of shock July 7,1976, in the Courtroom, and the failure of the respondent to eliminate the funds that were paid to clients,which were taxed by respondent in said stipulation of July 7, 1976.

PRELIMINARY STATEMENT

Frank L.Silverman and Anna Silverman, appeal from the decision and order of Judge William H.Quealy,of the Court Below,filed July 15,1976,and from each and every part of said decision and from the whole thereof denying petitioners motion to vacate the said stipulation

entered against them on July 12,1976, in the amount of

for the following years:-

1960	$ 5,874.20-Deficiency
Internal Revenue Code of 1954,Sec.6653(b)	2,937.10
	$8,811.30
1961	$18,654.07-Deficiency
Internal Revenue Code of 1954,Sec.6653(b)	9,327.04
	$27,981.11
1962	$14,468.00-Deficiency
Internal Revenue Code of 1954,Sec.6653(b)	7,234.00
	$21,702.00
1963	$ 6,819.82-Deficiency
Internal Revenue Code of 1954,Sec.6653(b)	3,409.91
	$10,229.73
1964	$ 8,427.47-Deficienc
Internal Revnue Code of 1954,Sec.6653(b)	4,213.74
	$12,641.21
1965	$12,480.22-Deficiency
Internal Revenue Code of 1954,Sec.6653(b)	6,240.11
	$18720.33

Recapitulation:

1960	$ 8,811.30
1961	$27,981.11
1962	$21,702,00
1963	$10,229.73
1964	$12,641.21
1965	$18,720.33
Totals	$100,085.68, plus statutory interest

FACTS

During the years, 1960,1961,1962,1963,1964 and 1965, petitioners were residents of the State of New York, and petitioner Frank L.Silverman,was employed by the Workmen's Compensation Board of the State of New York, and received wages during each and every year to wit* 1960, the sum of $8244.85, the year 1961, the sum of $9725.44, for the year 1962, the sum of $10,841.11, and for the year 1963, the sum of $11,643.83, and for the year 1964, the

sum of $12,602.87, and for the year 1965, the sum of $13,715.01, which amounts have been duly reported in the income tax returns for all of the aforesaid years, and the tax on said earnings were paid each and every year. That in addition to the above, petitioner conducted an office for the practice of law and general insurance.

That the income received by petitioner Frank L.Silverman, from his employment, the receipts of funds received from the law practice and the all of the insurance premiums received from the insurance were all deposited in the several banks, for proper transmission to clients and the several insurance carriers.

That all payments were made by the petitioner, Frank L. Silverman, by checks from the several banks, to clients, insurance companies for clients premiums.

The Commissioner of Internal Revenue, did not make any audit prior to the serving of the Statutory Deficiency Notices upon the petitioners and the undersigned, June 8,1968 and September 15,1972.

That the Statutory Notices were based on bank deposits, and/or settled cases of petitioner Frank L.Silverman's clients.

Petitioners in an effort to defend the deficiency notices sought to secure a bill of particulars regarding all of the lumped sum as set forth by the respondent in his notice of deficiency.

That each time petitioners made a motion for such information before the Tax Court, the said motion was denied on the several occasions.

Finally a motion was duly made before the United States Tax Court, pursuant to Rule 71 Tax Court Rules of Practice and procedure, which was denied by the Court.

On pages A-348 to A-352, by Hon.William H.Quealy, made the following remarks:-

" Well, let me say, Mr. Silverman, that the Court is fully familiar with your position and familiar with your motions which you've filed previously in this case on several times. Your motion is again denied and if it were -- had been set properly, the Court would go ahead and enter a decision for the respondent just as the Court did in the Century case. But by reason of the fact that this was merely set on the motion and the manner in which the order was entered, the Court does feel constrained not to do so. However, this case is being set for trial at the calendar which commences here on December 1st;and it is the intention of the Court if you are not ready,willing and able to go to trial at that time, that a decision will be entered. This case has been pending since 1968. It's been on every calendar, I believe, that-- it's been up here in that pwriod of time. This is a repetition of a motion that you have. The Government has cooperated with you. Mr. Menillo has been before this Court several times and explained the information he's given to you. Now,this is the end of the road, so I'm relling you now so that you can be prepared, this case will be tried December 1st. Your motion to-- for further discovery is hereby denied.

Mr. Silverman: May I be heard, Judge?

The Court: You may be heard now.

Mr. Silverman: Now, I have served papers on Mr. Menillo April 30th. He did't have the courtesy to serve a reply within the 45 days as required by--

The Court: Mr. Silverman, you've been serving papers in this case since,I think,1968 or 1969. The files-- how many times has this case been up--up here?

Mr.Silverman: Several times.

The Court: That's right. So we've come to the end of the line.

The Court: You've had plenty of time. There are stipulation processes. I'have read the transcripts of the prior hearings. You have been furnished with all the information that the Government has that should enable youto meet your burden in this case, if you can meet it. This is a bank deposit case,right?

Mr.Silverman: No,Sir. Not totally.

The Court: Well--

Mr. Silverman: Judge, I'd like to call your attention to one fact. Asking a petitioner to come into Court and tell the Court a lump sum of $ 3000.00 in one bank, a lump sum of $ 8000.00 in another bank, and so on and so forth, without meeting the burden-- the burden on petitioner. I'd like to have a breakdown of these items, Judge. I'm entitled to it. That-- for that reason-- The Court: respondent-- respondent will give you-- as I understand it has given you whatever breakdown he has. If you-- if you run $100,000 in deposits through a bank, and you report $10,000.00 in gross income on your return, the respondent is entitled to ask you to explain the other ninety. That's your burden. Now, that's the way the Law's been interpreted as long as I'have been in it,, and that's been a long time. And you and I have had other cases here, and we've gone through this--

Mr. Silverman: Yes, Your Honor.

The Court:-- Same thing before. And that's why I don't want to try your case, frankly, because I'd be the first to admit, I'd have a hard time being patient. But I am setting it down for December 1st. Judge Hall will be up here, and I'm sure the lady will show great-patience and dilligence in seeing that case--can be brought to trial. Thank you,Mr. Silverman--continuing on page 352,Line 10;
The Court: Well, I found that trying to cooperate with you last time,Mr. Silverman, it did not cut down much time. But we won't talk about that. I'm not hearing your case, so that's --
Mr. Silverman: I think we did,Judge. I think your--"

On January 20,1976, this case came on by way of a motion of the respondent to compel petitioners to sign a stipulation of facts, before Honorable William H.Quealy,Judge. That said stipulation of facts were found by the Court to be incomplete, the case was continued to February 23,1976.

That between February 23 and January 20,1976, the respondent delivered to petitioners approximately 1000 exhibits, though prior thereto the fespondent claimed that he had none to furnish to petitioners.

That this case was continued to February 24,19[illegible], and on said date petitioners requested an adjournment for a reasonable time in view of the fact of the vast amount of information that was given petitioners on the eve of trial.

The Court granted to petitioners an adjournment to April 1,1976, less then a week to prepare a case of this kind of approximately 1000 exhibits delivered a day before trial.

That adjournment was granted by the same Judge who stated on the record that he did not want to try this case." I don't want to try your case,frankly, because I'd be the first to admit, I'd have a hard time being patient."(A-350 page,Line 23-25).

Further, the respondent not only failed to credit petitioner, Frank L.Silverman, the funds that were disbursed to his clients in cases that were settled and accounted for, but also failed to give credit of moneys that were also accounted for and were identified upon which a stipulation was entered into by respondent and petitioners; and that in addition to the above respondent attempted to offer into evidence cancelled stock certificates showing an alleged sale of stock, but the Court below rejected such offer and were excluded from evidence, but the Court below permitted the respondent to include the proceeds of the sale of the said rejected alleged sale of the stock, which was included in the stipulation entered into July 12,1976.

The Petitioner,Frank L.Silverman, upon regaining his equilibrium and examining the stipulation and realizing that the respondent failed to credit petitioners moneys that were paid to clients that were classified by respondent as unexplained deposits, and also moneys that explained ' respondent upon which a stipulation was entered into between the petitioner and respondent to the extent of the sum of $13,424.19, that should have - eliminated from the unexplained deposits, petitioners moved immediately by way of a motion to vacate the said stipulation and at the same time asked to be heard on said application before the Court below. The Court below denied the said application, by issuing the following order:-

"Upon consideration of the documents and attachments received from petitioner Frank L.Silverman on July 14,1976, which said document and attachments have been filed in each of these cases as of the date received as petitioners' motion to vacate stipulated decision, it is

ORDERED that the aforesaid motion to vacate stipulated decision filed in each of these cases on July 14,1976, is hereby denied.

The stipulated decision entered in each of these cases on July 12,1976 remains in full force and effect as of its entry date."

(Signed) William H.Quealy
Judge.

Dated: Washington, D.C.
July 15,1976.

It is respectfully called the Court's attention,that the respondent did not submit any papers in opposition to the petitioners' application or make any denial of the petitioners' allegation in the application of July 14,1976, in the Court below therefore in the light of the above the Court below is clearly erroneous.

The issues dealing with the statutory notices mailed to petitioners June 6,1968 and September 15,1972, the amended answers of the respondent and the new schedules as submitted by agents Wallace Neutuch, will be discussed under the separate headings in this appeal under individual points.

POINT I

THE DENIAL BY THE COURT BELOW OF THE GRANTING PETITIONER A BILL OF PARTICULARS TO CLARIFY THE STATUTORY NOTICE OF JUNE 6,1968, IS CLEARLY ERRONEOUS.

The petitioner moved pursuant to the provisions of Rules 17(c) (1) of the Tax Court Rules of Practice, that the Court below enter an order striking the allegations in the answer of the respondent in paragraphs 5(e),7(g) and &(h) requiring the respondent to file a further and better statement of facts upon which the respondent relies to sustain the allegations in paragraphs 5(e),7(g) and 7(h) of the answer, upon which the burden of proof is upon the petitioner, with respect to said deficiency notice of June 6,1968.

That in support of said application,petitioner urged in the Court below of the respondent's determination in the said notice of deficiency of $48,113.18 . That the petitioner was entitled to be advised by the said respondent how the above sum was determined by the said respondent as taxable income.(A-187-A-192).

The Court below denied said motion of the petitioner(A-199), dated April 11,1973.

The petitioner again moved for a further and better statement in answer and amendment to answer and to strike the answer of the respondent, the Court below denied said motion (A-200-A-212),see order dated June 13,1973(A-218)

The petitioners also made motions for bills of particulars with respect to the statutory notices of September 15,1972, for years, 1961,1962,1963,1964 and 1965(A-219-A248),both motions were denied by the Court below,see order dated September 17,1973(A-249-A251).

Petitionersthen moved before the Court below pursuant to Rule 71 Tax Court Rules of Practice and Procedure, for discovery

and inspection to determine how the respondent arrived at the sum of $ 36,843.21 tax for the year 1960(A-10), in the said deficiency notice of June 6,1968.

How the respondent determined that the taxable income for the year 1961, in his notice of deficiency the sum of $ 27,263.68 and for the year 1962, the sum of $22,107.44 and for the 1963, the sum of $9,621.42, and for the year 1964, the sum of $12,437.66 and for the year 1965, the sum of $23,678.20 (A-131).

The respondent's answer to the petition of the petitioners sets forth the tax due and owing is the sum of $7,771.37 for the year 1961 and the sum of $4,506.93, for the year 1962 and the sum of $4,732.61, for the year 1963 and the sum of $3,736.48,for the year 1964, and the sum of $8,606.[illegible]3, for the year 1965.(A-83-84) and (A-155-A-157).

The respondent presented another set of figures on the date this case was set for trial. That the said figures and/or schedules were new and different from the deficiency notices (A-400-A-404).

That these schedules were prepared and submitted to the Court a day before trial and some of them after the trial was in full swing. By doing that the petitioners did not have an opportunity to to look into those schedules and properly prepare for trial and meet the issues with respect to those said schedules, of Carl Wallace and Harold Neutuch,respondent's agents (A-410 Lines 1 to L-10).(A-410 Line 3 to 18).(A-412 Lines 2 to 25). (A-413 Lines 1 to 25) (A-414 Lines 1 to 25) (A-415 Lines 1-25).(A-416 Lines 1 to 16).

Since the testimony was at variance with the evidence produced by the respondent, the petitioner moved to set aside the statutory notices since the schedules submitted by the respondent were at variance

with the statutory notices of June 6,1968 and September 15,1972.

The Court in making the comment on page (A-416 Lines 19 to 22):

" THE COURT: MR.SILVERMAN--

MR. SILVERMAN;-- let him follow Rule 7463.

THE COURT:-- I thought -- I thought I made it clear to you to day that we're in the home stretch approaching the finish line and it-- it's going to be make or break this week, huh?

THE COURT: So,you-- you've done very well at stretching this case out for--continuing on page(A-417)
MR. SILVERMAN: Judge--

The Court--and--

Mr.Silverman:-- I wasn't stretching it.Most of the-- most of the responsibility falls on the respondent--

Mr. Silverman: -- if they would have given me the information I wanted--

THE COURT: All right--

Mr. Silverman:-- this case would have been resolved two years ago. I agree with your Honor.

THE COURT: That's right.

Mr.Silverman: They kept on playing games and would not give me the information until your Honor directed them to do so.

THE COURT; So we're going to wind everything up this week. So,are you finished--continuing (A-418 Lines 1 to 12)
Mr. Silverman::-- he has told the Court that these are new schedules--

THE COURT: That's right.

THE COURT: I--I say this,Mr. Silverman,I'd jump all over the respondent because I Don't want to to go back and-- and, to a point where we don't reflect any education that we have achieved during the last four years. I want-- at least hope that those years some progress was made.
So-- as I understand Exhibit 28-AD which is a new number for this schedule, that reflects all progress to date."

The record discloses (A-413,Lines 1 to 13) that respondent's

agents while preparing the new schedules for the respondent and in doing so made considerable eliminations of schedule C of the petitioners 1960 Tax Return. In fact they reduced the business expenses by almost 50% of said schedule. The said agents did the same to the Tax Returns of petitioners for the years 1961,1962, 1963,1964 and 1965.See exhibit 84 marked for identification(A-326). That those elimination were in excess of $20,000.00 for the above periods.

The Court promised to restore said eliminations.See (A-415,Lines 17-18). Needless to say, the Court never ordered those cuts restored nor did the respondent restore said eliminations.

The respondent and petitioner stipulated to eliminations to the extent of $13,424.19, of identified deposits by stipulation, but never gave credit to the petitioners for said eliminations. See (A-280-299).

That in addition to the above these agents charged petitioner with an unexplained deposit of $16,725.00. That said item of deposit was a return of capital from the sale of stock, a fact that the respondent conceeded(A-423,Line 9 to 11). All the petitioner was allowed credit for was the sum of $1125.00, and the sum of $15,600.00 though acknowledged by respondent yet same was never eliminated from the unexplained deposit charge, See (A-423 Line 15)(A-423 Lines 23 to 25), in favor of the petitioner for the year 1960.

That in addition to all of the above, respondent did some shifting of income by including 1966 earnings to the 1965 return thus creating a greater liability for tax purposes, for the year 1965.

The item that was shifted by the respondent was the proceeds of the sale of the Braniff Stock in excess of the sum of $30,000.00,capital gains, from the taxable year 1966 to the taxable year 1965.

Assuming but not conceeding that the respondent in shifting the said item to be correct, the Court below committed error in allowing the respondent to charge the petitioners a 50% tax penalty on the taxable year 1965.

The Court below committed plain error when the said Court allowed the respondent to charge petitioners with capital gains in excess of $8900.00, but excluded from evidence the Atlas Credit certificates of alleged sale of same.See(A-461 Lines 10-25 and continuing to A-476 Line 5).

The Court below committed error when the respondent was allowed to charge a 50% penalty on the alleged profit of the sale of 44-1/10 warrants of United Airline,Inc.,when in fact said sale was the result of the reduction of cost derived from the exchange of 200 shares of Capital Airlines,Inc., and in addition permitted the respondent to impose a 50% penalty of the alleged profit of $1074.57, on petitioners tax return of 1965.

The totality of the facts before the Court below,and in view of the underlying philosophy of the Court in these cases, to see justice done unquestionably established that the Court below erred as a matter of law not to grant the petitioners motion to set aside the statutory notices of deficiency of June 6,1968 and September 15, 1972.(A-405 Line 8) (A-416 Lines 10 to 25continuing page A-417 Lines 1 to 19).

POINT II

The denial of the granting of the motion for discovery and inspection pursuant to Rule 71 of the Rules of the United States Tax Court was fully discussed in Point I..

POINT III

The trial Court erred as a matter of law in denying petitioners motion for discovery and inspection under Rule 71, of the United States Tax Court,September 22,1975, with the attendant statements made by the said Court,greatly prejudiced the rights of the petitioners in these cases(A-348 to A-352).

The Court below should have exercised the most care in a case of this kind, especially where the petitioner had no legal represntation in said Court, and where he was surrounded by two or more revenue agents, two or more lawyers and in addition thereto advisers to the said lawyers for the respondent. That with those vast resources at the commend of the respondent how can a petitioner secure a fair and just trial of the issues(A-720 Lines 16 to 19)

It appears that the respondent had private conversations with the presiding Judge, as the record indicates. The petitioner made a jesting remark to the respondent's attorneys and the next day the Judge made the following comment.-

> "If I were in a position of the respondent after some of the statements you made in Court--at recess that they weren't going to collect any money, I'd put an end to this stalling by just levying a jeopardy for the amount we've got--we know you owe-- (A-716 Lines 8 to 12).

That at the time the respondent conveyed the jest to the Judge the petitioners were not present, to be in a position to reply the said allegations of the respondent.

That under such circumsta nces the petitioners believe that a fair and impartial trial of the issues is hardly possible under such surroundings and atmosphere.

In Boyd v United States-116 U.S.616,at page 635-

> " It is the duty of the Courts to be watchful for the consitutional rights of citizens, and against any stealthy encroachments thereon.------"

On the morning of June 21,1976, the Court below made the following statements:-

> " Now, you know Mr.Silverman, this case has been on the calendar and call and all down around here for I guess at least 3 years if not 4 years,so this week's going to be the finale and there's a towel there, I know that your-- you make compassion pleas and all and I want you to have a crying towel there for you and we're going to go methodically and slowly and trust may be you can show us where the respondent's computations are--are incorrect. So--"(A-394 Lines 15 to 23).

It is respectfully submitted, in the light of these statemen statements made by the Court below,how can a petitioner hopefully secure a fair and impartial trial of the issues before such Court?

These cases were not on the calendar for 3 or 4 years, the Court records will bear that fact out. These are consolidated cases, it is petitioners belief that said cases came on the trial calendar for the first time in 1974.

The Court below should have taken judicial notice of the fact that the Government claimed taxes due for the year (A-83) 1961, to be $7,771.37, and for the year 1962, $4,506.93(A-83), and for the year 1963 , $4,732.61(A-156) and for the year 1964, $3,736.48(A-156) and for the year 1965,$8,606.43, and the said Court should have held the respondent to those figures and not the amounts as set forth in the statutory notices of deficiency, and the failure of the Court to do so, constituted error.

The respondent did not amend its answers(A-83-156)

See Moise v Burnett- 52 F.2d. 1071

The Court in that case enounced that the respective parties are bound by their respective pleadings.

The respondent knew August 4,1967, of the alleged deficiency with respect the years 1961,1962,1963,1964 and 1965, that the petitioners will be charged(Exhibit 29-A-327).

The respondent neverthless mailed notices of deficiencies September 15,1972, for years 1961,1962,1963,1964 and 1965, though more than 5 years elapsed since the notice of August 4,1967 that was mailed to petitioners(A-131-A-137,Exhibit 29-A-327).

Petitioners Moved before the Court below to dismiss the notices of deficiencies received September 18,1972,with respect to the years 1961,1962,1963,1964 and 1965(A-425,lines 17 to 21)

The petitioner also moved before the Court below claiming that the deficiency for the year 1960,was also barred by the Statute of Limitations,for all years.

The Court below did not rule on said motions.

The Court below committed error by ruling against the petitioners' motion.

POINT IV

These cases came on for trial January 20,1976,and were continued to February 23,1976 and again continued to February 24,1976. That between January 20,1976 and February 24,1976, respondent turned over some 1000 exhibits to the petitioners, at the direction of the Court.

Petitioners submit that the receipt of such voluminous amount of exhibits on the eve and on the trial date of these cases, which information was sought by petitioners for the last two years required adequate time to prepare for the trial of these consolidated cases. Reason and fairness would indicate that it would be physically impossible to do justice in the preparation of such cases unless an adequate period of time was allocated for such purpose and accorded the petitioners.

The Court below refused to grant petitioners such an adequate adjournment, but adjourned same to April 1,1976(A-381, Lines 23-24(A-382,Lines 23-24).

In the light of the above, it could hardly be called an adequate adjournment from February 24,1976 to April 1,1976, in cases of this magnitude where the period involved is in excess of ten to fifteen years duration.

The totality of the above facts and the statements made by the Court below(A-348-352) unquestionably establishes that the Court below erred as a matter of law not to grant petitioners an adequate and reasonable adjournment, so that the petitioners have the opportunity to adequately and properly prepare these consolidated cases for trial and to meet the issues therein.

POINT V.

The Trial Court erred as a matter of law directing petitioners to execute a sipulation of consent June 24,1976,and ruled that the Statute of Limiations was not applicable.

That on June 24,1976, the Court below spent the greater part of the day to direct the petitioners to sign a stipulation of consent(A-641-690). The petitioners refused to sign such consent, because of the fact the respondent and the Court below failed to credit petitioners escrow funds such as the Cutrone matter(A-646-650, Line 24), and other escrow funds repaid to and for clients(A-653-654), although proof was submitted to show repayment of such escrow funds to clients/or for clients. That these escrow funds were deposited in the various banks of the petitioners. Merten-Law of Federal Income Texation, Vol.2-Section 12.12 Page 72,"The making of a bank deposit does not prove the receipt of taxable income." See Coe v Commissioner 198F2d.at page 851- the Court said-

" He(the taxpayer reasons first and correctly that proof of bank deposits standing alone does not establish the receipt of income".

In the O'Dwyer case- O'Dwyer v C.I.R. 266 F.2d.575 at page 588, the Court said-

" All taxpayer had to do in order to overcome the presumption of correctness was to make some reasonable explanation as to the source and nature of the deposit in question. The presumption existed, the commissioner's determination was correct prima facia and the burden was upon the taxpayer in the Tax Court to overcome this presumption".

The petitioners did overcome that presumption by pointing out to the Court below where the funds came from and where said funds were destined to by the said petitioners.

It appears that the rule laid down in the O'Dwyer case,that the taxpayer has to make a reasonable explanation as to the source and

nature of the unexplained deposit. In the Estate of Gladys Horowitz-T.C.Memo 1965,269, this Court held that the petitioner had carried the burden of proving that bank deposits were not taxable income.

The Court below did not do so in the case at bar.

The Court below determined that the statute of limitations does not apply to case where fraud is involved. It is respectfully called the Court's attention to the fact after the discovery of the alleged fraud by the respondent he may not wait a longer period of time beyond the 3 years statute. The record indicates that the said respondent had full knowledge of the facts on or before August 4,1967, (Exhibit 29-A-327), and the notices of deficiencies were mailed September 15,1972 and received by petitioners September 18,1972,a period of more than 5 years, the Court below ruled against the petitioners-(A-682,Lines 15-16).

The petitioners contend that after the lapse of 3 years, and excess of 5 years in these cases with knowledge of all the facts at the commend of the respondent,the failure on the part of the respondent to mail any notice of deficiency within the statutory period is a complete bar and the Court below should granted petitioners motion, and the said notice of deficiency and/or deficiencies should have been vacated and declared of force and effect.

It is respectfully urged upon this Court to make such declaration in the interest of justice.

POINT VI

The Trial Court erred as a matter of law not granting petitioners a mistrial and assign these case to another Judge

It is respectfully called the Court's attention to the fact that the Court, September 22,1975, its desire not to sit and and hear these case and the reason was specifically set forth for such desire(A-348-352).

That under such circumstances how can a petitioner secure a proper and fair trial of the issues?

It is respectfully called the Court's attention to the fact that a Court should not express an opinion with regard to either side of the issue, in this case the Court below did.

The Court below during the cause of the trial expressed his feeling of the petitioner in an unpleasant sort of way(A-700,Lines 9-11) a statement that is not a fact. That at no time did petitioner ever admit that he was a tax evader. But the Court found that the respondent attempted to, to introduce manufactured evidence such as cancelled stock certificates, which were excluded by the very same Judge (A-467,Lines 8-14).

Now, it can be said that the petitioners were of the belief that what took place in the Courtroom June 24,1976, did not have any bearing on these cases in the Court below, or what took place in the Court below June 25,1976?

That upon all the facts and circumstances as above indicated, the Court below erred not to grant petitioners a mistrial and assign these cases to another Judge for trial.

POINT VII

The Trial Court erred as matter of Law not directing respondent to the elimination of the 50% penalty provision the additional 50% tax for the years 1960 and 1965.

The respondent failed to prove fraud in the Court below for the taxable year 1960.

The respondent offered no evidence to the contrary that the deficiency notices were untimely served on petitioners, September 18,1972,dated September 15,1972.

The petitioners proved to the Court below that the $16,725.00, deposited in the East River Savings Bank, in 1960, was a return of capital (A-423,Lines 9-25(A-424,Lines 1-12).

Petitioner proved and accepted by the respondent that the sum of $8244.85 received by the petitioner as wages received from employement, (Workmen's Compensation Board,State of New York),less Federal Taxes of the sum of $1250.04 or a net sum of $6,994.81.

Respondent conceded to the following eliminations(A-280-282);

East River Savings Account No.3374(A-423-424)....	$ 3,291.22
East River Savings Account No.37218.....	200.00
East River Savings Account No(A-423,Lines 9-25,etc.)	16725.00
Merchants Bank of New York...2/25/60.....	230.04
" " 3/9/60.....	230.04
Merchants Bank of N.Y.Special Account 9/7/60.....	245.06
11/30/60.....	245.06
" " 12/14/60.....	245.06
" "	
Wages Received(W.C.Board S.N.Y.)....Net.....	6994.81
Escrow Funds due clients..... 1960.....	5064.34
Loand deposit....1960.....Merchants Bank.....	2990.65
Gross settlement of clients cases 1960.....	11738.75
Received Insurance Premiums for transmission.....	2480.55
(Commission charged petitioner Ex.18-R 165.37)	$50,680.58
Total of all indentifiable deposits.(1960)	$50,680.58

The respond ent though he had knoweldge of all of the above yet the said respondent failed to credit petitioners all of the above amounts for the year 1960.

Petitioners surrendered the Braniff Airlines stock pursuant to a tender offer by the company, late in 1965(A-503 Line 13). The proceeds of said sale were received by petitioners late in 1965, and the proceeds of said sale were not available till January 1,1966,the petitioners exhibit 79 page A-185.

The petitioners reported that sale and profit in the taxable year 1966, since the the petitioners are on a cash basis and the funds were not available in the year 1965(A-185-Exhibit 79).

However, the respondent shifted the profit realized from the Federal Tax Return of 1966 to the year 1965 tax return, thus creating a profit for the year 1965, leaving the petitioners with a loss in excess of $40,000.00(A-185).

That in addition to all of the above repondent charged petitioners a 50% penalty on the income for the year 1965.

How can the petitioners be charged with fraud penalty when respondent shifts income ignors losses as in this case?

Yet,the Court below knowing all of the facts permitted the respondent to do what he did, and to permit such action would greatly harm and prejudice the petitioners herein.

Petitioners received 44-1/10 warrants and 30 shares of United Airlines,Inc.,in exchange for 200 shares of Capital Airlines, Inc.,(A-500 Lines 6 -25).

Petitioners sold said warrants and received the sum of $2177.07. The petitioners did not report said sale believing that the receipt of the proceeds of same was a reduction of the cost since the remainder of the 30 shares of stock were not sufficient to make the sum of $2177.07 equal to the cost of the Capital Airlines,Inc., Stock.

The respondent charged petitioners with the fraud

penalty of 50% on the tax for the year 1965. The Court below also knew all of the facts with respect to the Capital Airlines,Inc.,stock transfer into the United Airlines,Inc.,stock, and yet permitted the respondent the penalty of 50% on the tax for the year 1965.

Petitioners submit, that upon the foregoing facts the Court below erred in allowing and permitting respondent to charge petitioners with the 50% fraud penalty on the 1960 tax nor was there any fraud with respect the 1965 tax, but was due solely as a result of the shift made by the respondent. The said shift left the petitioners with a loss in excess of $40,000.00,deficit.

POINT VIII

The Court below erroneously denied petitioners motion filed July 14,1976, without affording petitioners a hearing thereon.

The trial in the Court below on June 25,1976, was continued to July 7,1976. During the aforesaid period, the respondent, his revenue agent and petitioner had conferences in the respondent's office in an attempt to identify the unexplained deposits in connection with these case.

The trial in the Court below resumed July 7,1976, and the respondent made the following statement to the Court:

> "MR. KLETNICK; Okay. On the conclusion of the proceedings on June 25th, a couple Friday's ago, respondent met with petitioner. The purpose was to analize additional evidence submitted by the petitioner. The results of that were as follows: of approximately-- or I'd say about $100,000.00 of unexplained deposits. Petitioner offered no explanation at all for $28,000.00. Of the remainder, petitioner's explanations were rejected by respondent except for about $2,800.00 of additional eliminations made by respondent. The parties then prepared a Supplemental Stipulation of Facts which are basically concessions by the respondent which concede approximatly $2,800.00 of new eliminations".

Petitioner delivered to respondent's attorneys, February or March, 1976, prepared schedules of settled cases, the closing statements of which were filed with the Judicial Conference , indicated of approximately $17,000.00 of gross receipts for such cases.

The respondent at his office, June 27, 1976, advised petitioner that he would not accept said schedule of cases unless the closing statements were exhibited to him, for the year 1960.

Petitioner on June 28, 1976, caused the service of a subpoena on the Judicial Conference of the State of New York, at 270 Broadway, New York, N.Y. requesting the production of said closing statements for the 1960(A-279), made returnable June 29, 1976, at 9:30 A.M.

Petioner after the service of said subpoena, received a phone call from the Judicial Conference Office, Mr. John Ray, assistant attorney for the Court Administration , that the records as described in the subpoena, because of the Court Reoganization were located in two parts, and the years sought for the production were located in Appellate Division, First Department and on microfilm, and that it will take at least one month to produce them. That fact was told the Court below by petitioner(A-708, Lines 2-225; A-709, Lines 1-25)

Petitioner is of the opinion that when the respondent saw a credit due petitioner to the extent of $17,000.00, he began to object to the receipt of the schedules submitted to him February of March, 1976, at the direction of the Court when the said case was set down for trial.

Petitioner then requested an adjournment until the records of the closing statements could be submitted to the Court to prove disbursements of the funds to the clients of those settled case.

Respondent admits that he did not credit petitioners for any item for the year 1960(A-730,Lines 5-6). That the year 1960, there was about $17,000.00 of actual settled cases, that one-half of which paid to clients of those cases.

This Court's attention is respectfully called to the remarks made by the Court below,regarding the respondent treatment of petitioners(A-731,Lines 22-25).

Petitioner advised the Court below that he did not fell good for the last three days(A-718-Lines 22-25).

About one hour later petitioner became ill and could not stand up and asked the Court for permission to take a seat and for water. The Court granted petitioner's request at that point(A-727 Lines 1-25).

After that nothing matter because the petitioner was in a state of shock, and whatever transpired thereafter petitioner was not aware of, and the consent to the stipulation followed,July 7,1976.

The Petitioner several days after recovering from his state of shock and also realizing that the respondent failed to credit petitioners the exempted items of deposit pursuant to the stipulation filed with the Court(A-280-286) and the credits that were due to petitioners of the funds that paid to clients,the proceeds of the settled cases, moved by of a motion before the Court below(A-304-318), and on respondent's exhibit 20-T(A-324) exhibit 21-U(A-325),July 12,1976.

The Court below denied said application without any opposing papers of the respondent,without affording petitioners a hearing on said application(A-319).

Appellants submit that the requisite foundation to move pursuant to Rule 59 of the Rules of Civil Procedure was present in these cases in the Court below and that the denial by the said Court of the Petitioners application was erroneous and contrary to the intent and meaning of the said Rule.

CONCLUSION

For all of the aforesaid reasons, the denial of the petitioners motion to vacate the stipulation entered in the Court below July 12,1976, should be reversed and in the alternative, these cases be remanded to the United States Tax Court,New York City Calendar, and for such other and different relief as to this Court may seem just and equitable in the premises in the interest of justice, for which no prior application was ever made before this Court for the relief respectfully requested herein.

Respectfully submitted

Frank L. Silverman

FRANK L.SILVERMAN,PRO SE
FRANK L.SILVERMAN,for ANNA SILVERMAN
258 Broadway,New York,N.Y.10007

October 27,1976.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- x

FRANK L.SILVERMAN ET AL.,

Petitioners-Appellants,

v. Docket No.76-4195

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

FRANK L.SILVERMAN, being duly sworn, deposes and says:

That I am over the age of twenty-one years, that I reside in the City and State of New York.

That on the 28th day of October, 1976, deponent mailed a copy of the Petitioners-Appellants, brief in the above matter to the Department of Justice, to Gilbert E.Andrews, Esq., Washington, D.C., 20530, the address designated by the said attorney for the above purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office official depository under the care and exclusive custody of the United States Postal Service, at 90 Church Street, New York, N.Y. 10007.

Sworn to before me this
28th day of October, 1976.

Frank L. Silverman
FRANK L.SILVERMAN

: OF NEW YORK, COUNTY OF ss.:

ndersigned, an attorney admitted to practice in the courts of New York State,

Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Attorney's Affirmation shows: deponent is the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

ndersigned affirms that the foregoing statements are true, under the penalties of perjury.

:

.....
The name signed must be printed beneath

: OF NEW YORK, COUNTY OF ss.:

Individual Verification being duly sworn, deposes and says: deponent is the in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

rounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

to before me on 19

.....
The name signed must be printed beneath

: OF NEW YORK, COUNTY OF ss.:

being duly sworn, deposes and says: deponent is not a party to the action,

r 18 years of age and resides at

Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Affidavit of Personal Service On 19 at deponent served the within upon the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

to before me on 19

.....
The name signed must be printed beneath

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Index No. Docket 76-4195 Year 19

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FRANK L. SILVERMAN, ET AL.

Petitioners-Appellants

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

AFFIDAVIT OF SERVICE MAIL

FRANK L. SILVERMAN PRO SE
Attorney for Anna Silverman
Office and Post Office Address, Telephone
259 Broadway
New York, N.Y. 10007
(212) 267-2760

To Gilbert E. Andrews, Esq.
Department of Justice
Attorney(s) for Respondent-Appellee
Washington, D.C. 20530

Service of a copy of the within

is hereby admitted.

Dated,

.....